IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 292

MISSOURI PACIFIC RAILROAD COMPANY, *Petitioner,*

v.

ELMORE & STAHL, *Respondent.*

Petition For a Writ of Certiorari to the Supreme Court of the State of Texas

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PETITIONER'S REPLY BRIEF

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1. Respondent contends that "No conflict exists between the decision of the Court below and the decision [of the Court of Appeals] in the *Trautmann Bros.*

case." (Resp. Br. p. 2.) Respondent's attempt to explain away the conflict will not withstand careful scrutiny.

First, it is incontestable that both the district court and the Court of Appeals in *Trautmann* entertained a view opposite from that of the Texas Supreme Court in the present case with respect to the legal principle which governs the liability of a common carrier for spoilage to perishables. The district court in *Trautmann* stated:

> "When a shipment of a perishable commodity like honeydew melons arrives at a destination showing damage and the carriers show that they handled the shipment in the manner specified by the shipper and that they exercised reasonable care to prevent damage from any cause not necessarily involved in the method of transportation so chosen by the shipper, the carriers have established a defense to the shipper's action for damages." (Conclusions of Law of the District Court in *Trautmann Bros. Co.* v. *Missouri Pacific Railroad Co.*, Para. IV, set out in Appendix to Petition, p. 30a.)

The Court of Appeals stated (App. to Pet., pp. 27a-28a):

> "A common carrier is not absolutely liable for spoilage or physical deterioration during the course of shipment. So long as the carrier has discharged its duty of reasonable care, it is not liable for 'damage to a shipment caused . . . by the operation of natural laws upon it . . . .'"

On the other hand, the lower court in the instant case held that the "carrier may not exonerate itself by

showing that all transportation services were performed without negligence." (App. to Pet., p. 6a.)[1].

Second, respondent argues that in *Trautmann* the trial court found that the spoilage of the shipment of melons was due to an inherent vice in the fruit, whereas in the present case "the jury found that the damage was not due solely to an inherent vice" (Resp. Br. p. 2).[2] In *Trautmann*, the district court felt that since a large number of complaints had been filed with respect to the decay of melons during that season in that locale, the shipper was required to prove that the particular shipment of melons involved did not suffer from an inherent vice (Resp. Br. pp. 6-7). The district court held "as a matter of law, that the shipper had not discharged its burden of proof" in this respect (*Ibid.*). In short, the ruling of the trial court in *Trautmann* as to inherent vice was not based on any affirmative evidence as to defect in a particular shipment, but was a conclusion of law which flowed from

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[1] The district judge in *Trautmann* stated that "The rules of law announced by the Supreme Court of Arizona in *Southern Pacific Company* v. *Itule*, 74 P.2d 38, 115 A.L.R. 1268, apply to these interstate shipments of perishables." (App. to Pet., p. 30a.) The lower court in this case, however, declined to follow the *Itule* doctrine (*Id.* at p. 8a). See Petition, pp. 10-11.

[2] Respondent's statement concerning the jury finding in the present case is incorrect. The jury was asked (Tr. p. 19): "Do you find from a preponderance of the evidence that the worsened condition, if any, of the honeydew melons . . . at the time of their delivery at Chicago . . . was due solely to an inherent vice . . . existing at the time the melons were received by the carrier . . . ?" The jury answered this question in the negative. As we have noted (Petition, p. 5 n. 3), under Texas law a negative answer to a special instruction does not constitute an affirmative finding; it means only that the point was not established by a preponderance of the evidence.

the rules as to the burden of proof which the court thought applicable.

The significant factor, however, is that the Court of Appeals deemed the controversy as to inherent vice immaterial. In ruling that the carrier was not liable, Judge Hutcheson stated: "Even if it is true, as appellant contends, that the district court's finding of inherent vice was based upon improper inferences from general conditions at Laredo, the evidence is nevertheless ample to support the judge's additional finding that *the defendant was not negligent and hence did not contribute to the spoilage.*" (App. to Pet. p. 29a) (emphasis supplied).[3]

In brief, the district court's conclusion of law as to inherent vice in *Trautmann* and the jury's response to the instruction in this case (note 2, *supra*) do not affect the central issue presented: Is a common carrier liable at common law under a uniform straight bill of lading for spoilage to perishables in transit notwithstanding a finding that the carrier "was not negligent and hence did not contribute to the spoilage?" There is a square conflict as to that fundamental issue between the lower court and the Fifth Circuit.

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[3] Respondent's reliance (Resp. Br. p. 3) upon *Thompson* v. *James G. McCarrick Co. Inc.*, 205 F.2d 897 (5th Cir. 1953) is misplaced. In that case, the "only" question was "whether the written instrument filed constituted a valid claim" under the bill of lading (*Id.* at 899).

In addition to *Trautmann Bros.*, the view of the Fifth Circuit respecting the carrier's liability for spoilage to perishables is delineated in *Atlantic Coast Line R.R.* v. *Georgia Packing Co.*, 164 F.2d 1 (5th Cir. 1947), where the Court stated that the perishable protective tariff rules "limit the liability of a carrier transporting perishable goods to liability for negligent failure reasonably to carry out instructions given by the shipper." (164 F.2d, at 3.)

2. Respondent makes no attempt whatever to distinguish the opinion of the Court of Appeals for the Ninth Circuit in *Larry's Sandwiches, Inc.* v. *Pacific Elec. R.R.*, No. 18,265 (9th Cir. June 3, 1963), [reprinted in App. to Pet. p. 33a]. We submit that case is directly in conflict with the ruling of the lower court here and constitutes an additional ground for granting the writ.

3. Petitioner's position is that in a case of spoilage or decay of perishable commodities—if a *prima facie* case is first established by the shipper—the carrier must show, in order to be exonerated, that it carried out the shipper's instructions and performed all its other duties in a reasonably prudent manner.[4] When that burden has been discharged, as in the case at bar, the carrier is not liable if a perishable commodity decays in transit. That is the thrust of the decisions of the Courts of Appeals in *Traytmann Bros.* and *Larry's Sandwiches Inc., supra.* The lower court in this case held exactly to the contrary. There can be no doubt that under these conflicting de-

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[4] Respondent is mistaken in suggesting that under this rule a common carrier would be held to "a lesser degree of responsibility than . . . a warehouseman or a private carrier." (Resp. Br. p. 3.) A cold storage warehouseman is not an insurer of perishables; he is required to exercise due care. See e.g., *Brace* v. *Salem Cold Storage Inc.*, —— W. Va. ——, 118 S.E. 2d 799 (1961). The liability of private carriers does not afford a parallel since such carriers and shippers are "free to regulate their mutual rights and obligations by private arrangements suited to the special circumstances . . . ." *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 314 U.S. 104, 110 (1941).

The 1918 Interstate Commerce Commission proceedings with respect to bills of lading do not aid Respondent (Br. p. 3). There was no intent that the common law evolution of the law governing the rights of shippers and carriers should be frozen as of that date.

cisions the liability of a railroad in Texas for the decay of perishable products will depend on whether the suit is tried in a state or federal court. Certainly, the resolution of this conflict presents a valid and persuasive reason for the grant of certiorari.

Respectfully submitted,

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